

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WENDY J. VANEMBURG,
Plaintiff,
v.
MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

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Plaintiff Wendy J. Vanemburg proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1967.¹ She has a GED and previously worked as a

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 nursing assistant caregiver. (AR 118-19.)

02 Plaintiff filed applications for DIB and SSI on June 10, 2008, alleging disability
03 beginning December 31, 2003. She is insured for DIB through June 30, 2009. Plaintiff's
04 applications were denied at the initial level and on reconsideration and she timely requested a
05 hearing.

06 On September 15, 2009, ALJ Marguerite Schellentrager held a hearing, taking
07 testimony from a medical expert. (AR 34-50.) Plaintiff did not appear. On October 5, 2009,
08 the ALJ issued a decision finding plaintiff not disabled. (AR 24-33.)

09 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review
10 on November 1, 2007 (AR 1-5), making the ALJ's decision the final decision of the
11 Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
17 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had
18 not engaged in substantial gainful activity since the alleged onset date. At step two, it must be
19 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's
20 polysubstance dependence and affective disorder severe. The ALJ found that plaintiff did not
21 have a severe physical impairment. Step three asks whether a claimant's impairments meet or

22 Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 equal a listed impairment. The ALJ found that plaintiff's impairments, including the
02 substance use disorders, met the criteria of sections 12.04 and 12.09 of the Listing of
03 Impairments. The ALJ found that, if plaintiff stopped the substance use, she would not have a
04 severe impairment or combination of impairments. Therefore, the ALJ found plaintiff's
05 substance use a contributing factor material to the determination of disability and, accordingly,
06 found plaintiff not disabled within the meaning of the Social Security Act.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

15 Plaintiff argues that the ALJ failed to properly evaluate her credibility, erroneously
16 evaluated the materiality of her substance use to her disability, and failed to consider her
17 physical limitations. She requests remand for an award of benefits or, alternatively, for further
18 administrative proceedings. The Commissioner argues that the ALJ's decision is supported by
19 substantial evidence and should be affirmed.

Credibility

21 Plaintiff argues the ALJ did not articulate specific reasons for finding her not credible.
22 The Commissioner disputes this contention, noting the ALJ found plaintiff lacked credibility

01 because she misrepresented her substance abuse. *Thomas*, 278 F.3d at 959 (finding that lack
02 of candor regarding substance abuse supported the ALJ's negative conclusions about the
03 claimant's physical description of her pain).

The Court agrees with the Commissioner that the ALJ properly relied on plaintiff's inconsistent reporting of her substance use in finding her not credible. In January 2008, plaintiff claimed to have been sober for eleven months; in April 2008 she claimed to have been sober for 14 months; in July 2008 she claimed sixteen months sobriety. (AR 27, 28.) However, the ALJ noted the evidence showed ongoing substance use for more than a year, noting plaintiff told a psychological examiner she had used crack cocaine, marijuana, alcohol, and methamphetamine during the last year. (AR 28, 284-85.) Plaintiff does not establish error in the ALJ's consideration of her credibility.

Physical Impairment

13 At step two, a claimant must make a threshold showing that her medically determinable
14 impairments significantly limit her ability to perform basic work activities. *See Bowen v.*
15 *Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). The ALJ found
16 plaintiff had severe impairments consisting of polysubstance dependence and an affective
17 disorder, but did not find she had a severe physical impairment.

18 Plaintiff argues the ALJ erred in failing to consider her physical symptoms in the
19 evaluation of her disability. However, the ALJ did give consideration to the possibility of a
20 severe physical impairment, and concluded there was none:

I do not find that the [plaintiff] has a severe physical impairment. While she presented to Dr. Opalenik that she had a long term history of pain in her back and hands, there is no evidence of any complaint or treatment for these

01 impairments. While she told him that she could not stand for long periods, she
02 later reported that she enjoyed hacky sack, going to the park, cooking and
03 cleaning. This is completely inconsistent with the [plaintiff]'s report to Dr.
04 Opalenik. There are no x-rays or other objective findings of physical
05 impairment. I do not give any weight to the opinion of Dr. Opalenik or the
06 State Agency physicians given the complete lack of objective findings of a
07 physical impairment, and the [plaintiff]'s general lack of credibility as noted by
08 her misrepresentations concerning her substance use.

09
10 (AR 29.)

11 Plaintiff acknowledges the ALJ gave no weight to the opinions of Dr. Opalenik.
12 Although plaintiff does not specifically assign error to the ALJ's findings in that regard, the
13 Court will consider it as implicit. However, the Court agrees with the Commissioner that the
14 ALJ did not err in the consideration of Dr. Opelenik's opinions.

15 Dr. Opalenik completed a physical evaluation of plaintiff on July 28, 2008. (AR
16 231-35.) Plaintiff said she had been having back pain since 1997 and the pain had been getting
17 worse since then. Plaintiff told Dr. Opalenik she could not stand for more than fifteen minutes
18 and changed her position frequently to relieve her pain. She said she had been clean and sober
19 for sixteen months. Dr. Opalenik diagnosed back pain, indicating an MRI would help assess
20 plaintiff's condition. The doctor indicated plaintiff could stand and walk for less than two
21 hours, lifting and carrying no more than twenty five pounds. Plaintiff also reported hand pain,
22 with somewhat enlarged metacarpal phalangeal joints, but the doctor found no limitations in
handling, noting plaintiff could play the guitar. (AR 28.)

23 As the Commissioner notes, symptoms alone are not enough to establish a medically
24 determinable impairment. *Ukulov v. Barnhart*, 420 F.3d 1002, 1005 (9th Cir. 2005);
25 ("[R]egardless of how many symptoms an individual alleges, or how genuine the individual's

01 complaints may appear to be, the existence of a medically determinable physical or mental
02 impairment cannot be established in the absence of objective medical abnormalities; i.e.,
03 medical signs and laboratory findings. ... In claims in which there are no medical signs or
04 laboratory findings to substantiate the existence of a medically determinable physical or mental
05 impairment, the individual must be found not disabled at step 2 of the sequential evaluation
06 process."); Social Security Ruling (SSR) 96-4p. As the ALJ noted, the evidentiary record is
07 completely devoid of any objective findings of a physical impairment. Rather, Dr. Opalenik's
08 report of back and hand pain was based on plaintiff's non-credible history of symptoms, found
09 to be contradicted by plaintiff's report that she enjoyed hacky sack, going to the park, cooking
10 and cleaning, as well as a lack of mention as to back pain in an examination the previous month.
11 (AR 28-29, 286.) The Court finds the ALJ did not err in the consideration of plaintiff's
12 physical limitations.

Drug Addiction and Alcoholism

14 A claimant is not entitled to disability benefits “if alcoholism or drug addiction would
15 ... be a contributing factor material to the Commissioner’s determination that the individual is
16 disabled.” 42 U.S.C. § 423(d)(2)(C). Therefore, where relevant, an ALJ must conduct a drug
17 abuse and alcoholism (DAA) analysis and determine whether a claimant’s disabling limitations
18 remain absent the use of drugs or alcohol. 20 C.F.R. §§ 404.1535, 416.935. That is, the ALJ
19 must, first, identify disability under the five step procedure and, second, conduct a DAA
20 analysis to determine whether substance abuse was material to disability. *Bustamante v.*
21 *Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). ”If the remaining limitations would still be
22 disabling, then the claimant’s drug addiction or alcoholism is not a contributing factor material

01 to his disability. If the remaining limitations would not be disabling, then the claimant's
02 substance abuse is material and benefits must be denied." *Parra v. Astrue*, 481 F.3d 742,
03 747-48 (9th Cir. 2007).

04 In this case, the ALJ conducted the DAA analysis, first finding plaintiff's mental
05 impairments to satisfy the requirements of sections 12.04 ("Affective Disorders") and 12.09
06 ("Substance Addiction Disorders") of the Listing of Impairments, 20 C.F.R. Part 404, Subpt P,
07 App. 1. Next, the ALJ considered whether plaintiff would be disabled if she stopped the
08 substance use, finding she would not. Therefore, the ALJ concluded plaintiff's substance use
09 disorder was a contributing factor material to the determination of disability and found plaintiff
10 not disabled. 20 C.F.R. §§ 404.1535, 416.935.

11 Plaintiff agrees that she is disabled, but contends her alcohol and drug abuse does not
12 materially contribute to the disability. Although plaintiff acknowledges she suffers from
13 alcohol and drug abuse problems, she maintains she was clean and sober at the time of her
14 January 24, 2008 evaluation (AR 220-23) and, therefore, her impairments were not affected by
15 drug or alcohol use.

16 In response, the Commissioner argues the ALJ reasonably concluded plaintiff's DAA
17 was material to her disability. Two of the three psychological assessments did not separate the
18 symptoms that would remain if plaintiff were to stop her substance abuse. The ALJ found that
19 the third assessment, from Mary Mangione-Lambie, Ph.D., was based on plaintiff's
20 representation that she had been clean and sober for eleven months at the time of her January
21 2008 evaluation. As previously discussed, the ALJ found plaintiff lacked credibility because
22 she had misrepresented her substance abuse, admitting in another evaluation that she had used

01 crack, marijuana, alcohol, and crystal methamphetamine during the same year she was
02 representing to other evaluators that she was clean and sober. (AR 28, 29, 222, 284-85.)

03 The ALJ relied on the testimony of Dr. Jay M. Toews (AR 94-97) who attended the
04 hearing and testified. (AR 42-48.) Dr. Toews opined that the evidence did not suggest that
05 plaintiff's polysubstance abuse was in remission (AR 46-47), that her substance abuse was
06 material, and that her reports of possible auditory hallucinations, panic-like episodes, and
07 depression appeared to be in the context of alcohol and drug abuse (AR 44-45). Giving
08 significant weight to Dr. Toews' opinion, the ALJ considered the four broad functional areas
09 for evaluating mental disorders under the disability regulations and the Listing of Impairments,
10 known as the "paragraph B" criteria. (AR 32.) Because the remaining limitations would cause
11 no more than "mild" limitations in any of the first three functional areas and no episodes of
12 decompensation under the fourth area of consideration, the ALJ concluded that any remaining
13 mental limitations were nonsevere if plaintiff's substance abuse stopped. (*Id.*)

14 The burden is on plaintiff to establish that DAA is not material to the disability claim.
15 *Para*, 481 F.3d at 748. The Court finds the ALJ did not err in finding plaintiff's drug abuse
16 and alcoholism was a contributing factor material to the determination of her disability, and,
17 therefore, plaintiff was not disabled within the meaning of the Social Security Act at any time
18 from the date of alleged onset through the date of decision.

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01 **CONCLUSION**

02 For the reasons set forth above, this matter should be AFFIRMED.

03 DATED this 20th day of October, 2011.

04 

05 Mary Alice Theiler
06 United States Magistrate Judge